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No. 88-___

SUPREME COURT, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF MACON, GEORGIA,

Petitioner,

v.

PASCO BUILDING SYSTEMS, a Division of AMCORD, INC., and DELTA ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

May a state court, by its definition of that state's rule of *res judicata*, nullify the scope and effect of the Federal Rules of Civil Procedure by concluding, in a subsequent state ruling, that certain claims which could have been asserted in a concurrently pending federal action as permissive cross-claims are barred by the election of a party (to the federal action) not to assert such permissive cross-claims in the federal action, when the subject of the cross-claim is the basis for a separate party's direct action in a state court?

May a state court obviate the clear dictate of Federal Rule of Civil Procedure 13(g) and convert permissive cross-claims into a form of mandatory cross-claim, to the prejudice of a state court litigant which was not a party to the federal proceeding, by the formulation of the state court's definition of *res judicata*, all contrary to clear federal authority which construes the Federal Rules of Civil Procedure? *See Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1503 (D.C. Cir. 1984); *Dunn v. Sears, Roebuck & Co.*, 645 F.2d 511, 512-13 (5th Cir. 1981) (f.n. 1); *Peterson v. Watt*, 666 F.2d 361, 363 (9th Cir. 1982).

The City of Macon does not raise in this Petition all issues which were before the lower courts, such as waiver by the Defendants or estoppel, but has instead limited this Petition to the federal questions presented.

PARTIES

All parties to the appeal and other proceedings below are listed in the above caption.

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PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals of Georgia has not yet been published, either in bound volume or in advance sheet format. A copy of the Opinion of the Court of Appeals, as issued in slip form, is reproduced in the Appendix at A-1. Petitioner, as Appellant below, moved for a rehearing with regard to that Opinion; the Order of The Court of Appeals of Georgia, denying that Motion for Rehearing before that Court, is reproduced at A-6. A summary of Petitioner's unsuccessful efforts to have the case reviewed by the Supreme Court of Georgia is set out below in the Statement of Jurisdiction.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals of Georgia, reproduced at A-1, was rendered on March 8, 1989. The City of Macon filed a timely Motion for Rehearing on March 17, 1989, and the Court of Appeals denied that Motion for Rehearing by Order entered March 27, 1989 (A-6). The Court of Appeals of Georgia is the highest Georgia Court to which the City of Macon could appeal as a matter of right; the Supreme Court of Georgia reviews decisions of The Court of Appeals of Georgia as a matter of discretion, by certiorari. Constitution of the State of Georgia, Article VI, Section VI, Paragraph V. The City of Macon filed its Petition for the Writ of Certiorari to the Supreme Court of Georgia on April 14, 1989, which was denied by Order entered May 4, 1989. (A-7). The City of Macon moved for a rehearing of the decision to deny its Petition, and that later Motion was also denied. (A-8). That denial was the last action taken by any Georgia court in the proceedings below, and there are no further and available appeals to any other Georgia court. Thus, the Opinion of March 8, 1989, by the Court of Appeals of Georgia represents a decision by the "highest court of the State in which a decision could be had" with regard to The City of Macon's rights. 28 U.S.C. 1257(a).

Jurisdiction for The City of Macon's Petition to this Court therefore lies under 28 U.S.C. § 1257(a), and this Petition is filed and served within ninety days of the entry of the Order of March 27, 1989, which denied Petitioner's Motion for Rehearing below. 28 U.S.C. § 2101(c); Supreme Court Rule 20.4. As Petitioner seeks the reversal of a decision of a state court, rather than the invalidation of any statute, Petitioner submits that the

notification requirements of 28 U.S.C. § 2403(b) do not apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

1. The Constitution of the United States, Article VI, provides in pertinent part:

* * *

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. The Rules Enabling Act, 28 U.S.C. § 2072, provides in pertinent part:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeal of the United States in civil actions . . . "
>
> * * *
>
> "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

3. Federal Rule of Civil Procedure 13(g) provides:

> "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action."

4. Georgia laws 1962, pp. 2323 et. seq. (establishing the Macon-Bibb County Industrial Authority) provides in pertinent part:

* * *

"Section 1. There is hereby created a public body corporate and politic in the County of Bibb to be known as the 'Macon-Bibb County Industrial Authority,' which shall be an instrumentality of the City of Macon and of the County of Bibb . . . "

* * *

"Section 5. The Authority shall not be authorized to, nor shall any act thereof, create any debt, obligation or liability against the State of Georgia or City of Macon or County of Bibb."

STATEMENT OF THE CASE

STATEMENT OF FACTS

This case arises from the sudden destruction by collapse of an airplane hangar at the City of Macon's airport. The hangar had been built "on behalf of" The City (Complaint, ¶ 3) and was occupied by Zantop Airlines. As a result of the calamity, two lawsuits were filed. Zantop sued a number of defendants for the loss of two Lockheed Electra Aircraft, commencing its action in the U.S. District Court in Columbus, Georgia. The City of Macon sued for the loss of the hangar itself in a separate action brought by it in a state court. The resolution of the concurrent federal action and the interpretation placed on that resolution by the Georgia courts give rise to this Petition.

The factual background to this case and the roles played by certain parties and non-parties account in large

measure for the procedural issues which are presented. Petitioner's efforts to raise and have the Georgia courts address the federal question which is presented here will be summarized at the conclusion of this Statement of Facts.

Much of the history of the underlying transaction was developed in the deposition of Tom Moody, the Executive Director of the Macon-Bibb County Industrial Authority; that deposition was obtained in the federal litigation and was offered also as evidence on the Motions which pended in the Georgia trial court. The background facts are not controversial and will be presented here in summary form.

Following World War II, the City of Macon acquired much of the property which now serves as its airport from the federal authorities. Expansion and development of the airport had been ongoing since that time, and the Defendant Delta Associates served generally as the City's planners and consultants with regard to the airport.

About 1978, the City of Macon, acting primarily through the office of the Mayor, undertook to make additions and improvements to the airport, primarily in the east ramp area. One of the mechanisms for funding these repairs or improvements was a grant program administered by the Economic Development Administration of the U.S. Government.

In the course of pursuing this funding option, it was apparently learned that the program's guidelines required the City to have a commitment from some person or entity to use the facility to be constructed, provide jobs there, etc. Therefore, while exploring the possibility

of federal funding, the Mayor was also working with Hawaiian Airlines, a freight airline, in an effort to get Hawaiian committed to establishing an air cargo operation at the hangar which the City wished to build.

After some time, the negotiations with Hawaiian and the negotiations with the Economic Development Administration produced an agreement whereby Hawaiian would locate its air cargo operation at the new hangar, pursuant to the agreed upon terms, if the City would build and make available the hangar which it wished to have. The grant program required some local funding, and it was determined that the Macon-Bibb County Industrial Authority (the "MBIA") would be the "financing conduit" (R-309) by issuing revenue bonds which would pay for the construction of the hangar and the related, attached office building.

(As a digression, it should be explained that the Macon-Bibb County Industrial Authority was established by special statute in 1962, and has, as its name implies, the purpose of promoting economic growth and development and the reduction of unemployment. Georgia Law 1962, pp. 2323-29. Georgia law generally prohibits local governments from incurring any long-term debt, and such independent "authorities" are frequently established or used for special projects or purposes which either require the incurring of debt or which are financed by the issuance of revenue bonds.)

It would appear that the financing mechanism chosen, from the standpoint of selling and rating the bonds, contemplated that title to the hangar would be recited to lie with the Authority, until the bonds were retired. At

that time, the formality of title would return to the City. However, even during the period of time that title was recited to be in the Authority, which would act as a "landlord" to lease the hangar, the City in fact retained all practical attributes, rights, and responsibilities of ownership. Thus, it will be seen that the City set out to build itself a hangar, it obtained bond and grant financing for the hangar, it permitted the hangar to be rented to the City's selected tenant (which lease was later assigned to a successor sub-tenant, Zantop), and it retained all the rights and responsibilities of ownership and would ultimately have the "paper" title as well. As will be discussed below, the mere recital regarding title should be of no moment to a resolution of the claims between the parties before this Court, in the context of the prior case having pended in a federal court governed by the Federal Rules of Civil Procedure.

By way of further explanation and orientation, it should be noted that the hangar or project at issue is really two different buildings or areas and types of construction. With regard to the claims at issue below, the main hangar itself is a prefabricated type metal building, having dimensions of approximately 120 feet x 220 feet. This pre-designed or pre-fabricated metal hangar was manufactured by the co-defendant Pasco. The second area is the office and related portions of a "stick-built" or custom constructed building which is approximately 30 feet x 220 feet and which abutted and was attached to the east wall of the hangar.

Delta Associates generally serves as the City's airport consultants and planners. With regard to this particular project, however, a specific consulting contract was

entered with Delta which was in the name of the City of Macon; however, a later version listed the Authority as the party to the contract. (This apparently reflected the bond financing requirements and the fact that income and disbursements would be made to and from the Authority's account.) Thus, certain of the various construction-related contracts also refer to the Authority as having the capacity of "owner."

It should be noted that the Authority, in acting to promote industrial development in both Bibb County and the City of Macon, has essentially no assets. In limited aspects, the Authority might be permitted to act as an agent for either the City or the County, but the Authority is proscribed by statute from taking any action which would create a liablity against either. Georgia Laws 1962, pp. 2323, 2325-26.

Because the Summary Judgment which was entered against Petitioner at the trial court level was on a purely procedural ruling, and because the resolution of the federal question and Supremacy Clause issues presented here does not turn upon a determination of whether the Respondents, as defendants below, were in fact negligent, a lengthy history of the design and construction phases of the hangar project will not be offered. It is sufficient to say that Delta Associates established the general specifications and standards which the hangar was to meet, including its ability to withstand windstorms, regardless of whether Delta was acting on behalf of the City, the Authority, or both. Similarly, Pasco, as the manufacturer of metal buildings, undertook to design and fabricate the structural and other components of the hangar, according to the specifications or standards set by Delta. Because of

the events which ultimately transpired, there are numerous questions of fact concerning whether the proper standards were set, the validity of design assumptions which were made in the process of writing the specifications, and whether Pasco's hangar was adequately engineered or fabricated to meet the specifications.

Construction of the hangar was completed in the general time period of 1979-80. Upon completion, and pursuant to the City's plan for acquiring, funding, and constructing the hangar, Hawaiian Airlines began operating from there. This operation was later terminated, for reasons not pertinent here. However, another freight airline was located (Zantop Airlines) which essentially took over Hawaiian's location and conducted similar operations. This assignment or sublease to Zantop was with the express consent of the City, which right was reserved to the City under its agreement with the Authority. Zantop undertook and pursued its operations there beginning in approximately the fall of 1980.

On March 21, 1982, the hangar was destroyed in a sudden and calamitous collapse, as a thunderstorm moved through central Georgia. By coincidence, the airport's anemometer was located very near the hangar, in the path of the approaching winds. The highest wind speed recorded was a gust of approximately 69 mph, significantly less than the 100 mph standard required by Delta's specifications and local codes.

As the storm approached, Zantop's employees happened to be working in or around the building, on two Lockheed Electra aircraft. They attempted to close the

doors of the hangar, but they were unable either to close the doors or keep them closed. Of special note, no adjoining buildings were destroyed, nor was the connecting or adjacent "stick-built" office building damaged, with the exception of some damage caused by the collapse of the hangar itself.

The collapse of the hangar caused damage to the City, with regard to certain payments which it was required to make while the hangar was not occupied, as well as the clean-up costs, the disruption at its airport, etc. In addition, the tenant, Zantop Airlines, had two large airplanes in the hangar at the time of the collapse, which were essentially destroyed.

Zantop Airlines and its insurer sued a number of parties in the United States District Court, Middle District of Georgia, Columbus Division, for the damages which Zantop suffered when the hangar collapsed on its two airplanes. (There were additional damages sought, such as damage to the parts inventory, etc.) That action included as defendants a number of the construction-phase related parties, such as the general contractor, certain subcontractors, and others. The City of Macon was *not* named as a party to that suit, although the Authority was named as a defendant, because of its obligations (as landlord) to Zantop through the lease-sublease arrangement.

Within a few months of the filing of the federal action in Columbus, the City of Macon filed its case in the Superior Court of Fulton County, in April, 1984. The City's case was premised upon the facts that the hangar was built for the City and that the City had incurred

damages as a result of the destruction of the hangar, the need for cleanup and rebuilding, lost rental, etc. A copy of the City's Complaint is reproduced at A-12.

The two cases pended concurrently for an extended period of time. Within the context of the federal action, the Authority filed the usual, almost obligatory, cross-claim for contribution or indemnity against its co-parties; at no time did the Authority ever seek compensation for the damage to the hangar itself or any of the related losses. The two cases were allowed by all parties in each case to be litigated concurrently, with extensive discovery being obtained, expert witnesses being engaged, the expert witnesses of other parties being deposed, and the like. Depositions conducted jointly, for example, included weather bureau employees in Macon, Georgia, as well as the Defendants' "wind expert", Dr. Theodore Fujita, whose deposition was taken at his offices at the University of Chicago. The City had also shared, at substantial expense, in underwriting the cost of an outside engineering analysis, the preparation of a computer model of the building, and the like.

While this case continued to pend in the Superior Court of Fulton County, and as the federal action was being prepared for trial, certain of the Defendants in that case were dropped from that action, either voluntarily or as a result of various parties' Motions for Summary Judgment not being opposed by the Plaintiff therein. Trial of the *Zantop* case began in March, 1987, before the Honorable Robert Elliott, United States District Judge. At the close of the evidence, counsel for the Authority moved for a directed verdict, which was granted upon all claims based upon negligence. The only issue remaining against

the Authority was its potential liability as a landlord, to its subtenant, Zantop, under general principles of landlord-tenant law and/or its contractual obligations under the lease.

As it was apparently recognized that the Authority could have no liability to its sub-tenant without there also being liability on the part of Delta Associates and/or Pasco, the Court and all counsel in the federal litigation expressly agreed that issues concerning the Authority's potential liability did not need to be submitted to the jury.

The trial was concluded by a general verdict in favor of all defendants, which mooted any issue of the potential liability of any co-defendant under the Authority's cross-claim for contribution and/or indemnity. Thus, the jury was never called upon, and never had occasion, to decide any issues concerning the Authority's obligations or rights.

Subsequent to the return of that jury verdict, which the Plaintiff therein elected not to appeal, Pasco's counsel in this action (which firm also represented Pasco in the federal litigation) filed a Motion for Summary Judgment in August, 1987, contending that the Authority's election not to pursue a cross-claim in the district court precluded the City of Macon's direct claim for its own damages in the Superior Court of Fulton County. This position was urged without any evidence to support the proposition that the Authority was authorized to act for the City or assert the City's legal rights.

Because of this Court's Rule 21.1(h), a somewhat more detailed history of the proceedings below, subsequent to the filing of Pasco's Motion for Summary Judgment, will be offered. That Motion was based upon a recent decision by the Supreme Court of Georgia, in which the Court had ruled that a Plaintiff's claim, as asserted in an action brought in a superior court, was barred because of the party's failure to assert that claim as a permissive cross-claim in a prior action involving the same party. *See Citizens Exchange Bank of Pearson v. Kirkland*, 256 Ga. 71, 344 S.E.2d 409 (1986). The Georgia courts thus seem to treat all cross-claims as compulsory.

In responding to the Motion for Summary Judgment, which was later adopted by reference by the co-defendant Delta Associates, Inc., (the consulting engineers and planners for the hangar and the airport), the Plaintiff responded with an initial Brief and a Supplemental Brief filed and served December 15, 1987. In its Brief of December 15, 1987, at pages 3 through 10, Plaintiff cited the Rules Enabling Act (28 U.S.C. § 2072), the Supremacy Clause, and *Hanna v. Plumer* (as well as other authorities) for the proposition that Georgia law could not be used to invalidate the clearly permissive nature of cross-claims in a federal proceeding as determined by the Federal Rules of Civil Procedure. *See Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965).

In addition to briefing that issue, the point was raised before the trial court during oral argument on the Motion for Summary Judgment on November 12, 1987. As counsel informed the trial court, "We have to look at federal law to determine what is the effect of asserting or not asserting a cross-claim in federal case, [sic] and the

effect is clearly none. The federal law uniformly recognizes that a cross-claim of this nature is permissive at best." (Transcript of November 12, 1987, hearing at p. 21).

Notwithstanding the clear reference to federal law and the authorities which have established that cross-claims in a federal action are permissive, the Superior Court of Fulton County, Georgia, granted the Defendants' Motions for Summary Judgment by an Order entered January 25, 1988, a copy of which is reproduced at A-9. The City thereafter took its appeal to the Court of Appeals of Georgia, the only court to which it could appeal as a matter of right. The rules of the Georgia Court of Appeals require an Appellant to prepare and file an "Enumeration of Errors," as a separate document. The Enumeration of Errors which Appellant City of Macon filed on September 14, 1988, in Item "1.B." stated as follows:

> "B. Any claims which could have been asserted by the MBIA in the federal action against any of the present Defendants were permissive, and an election (or even omission) by the MBIA not to assert such permissive claims cannot bar the City's claims in this action."

Moreover, the Appellant's Brief (at pp. 13-14), which was filed concurrently with its Enumeration of Errors, cited many of the authorities which are cited in Petitioner's argument below. *See Thomson-CSF Components Corp. v. Hathaway Instruments, Inc.*, 85 F.R.D. 344, 346 (D.C.N.J. 1980) and *Dunn v. Sears, Roebuck & Co.*, 645 F.2d. 511, 512-13 (5th Cir. 1981) (f.n. 1).

It will be noted that the Court of Appeals' Opinion of March 8, 1989, (A-1), while acknowledging that the other

action pended in federal court, is completely silent as to the presence or effect of this federal law issue. Accordingly, The City of Macon filed its Motion for Rehearing on March 17, 1989. Consistent with the rules of the Court of Appeals of Georgia, The City of Macon was required to state explicitly what authority it believed the Court of Appeals had overlooked; in compliance with this dictate, the second basis upon which The City of Macon sought a rehearing was stated as follows:

> "II. *Res judicata* is not applicable, as there is no former judgment at issue, but only a judgment rendered in concurrently pending litigation which was limited to a cause of action separate from that at issue in this litigation; moreover, the applicable Federal Rules of Civil Procedure, which define and determine the scope of the other action, do not permit the Plaintiff/Appellant's claims to be barred by the federal judgment;"

Again, the Court's attention was specifically directed to the federal authorities discussed below.

Finally, so that there can be no doubt that the federal question was explicitly raised but ignored by every Georgia court which considered this case, The City of Macon, Georgia, filed a Petition for Certiorari to the Supreme Court of Georgia, on April 14, 1989, in which the first issue argued (at p. 17) was defined as follows:

> "1. An election by a party in a federal action not to pursue a permissive Cross-claim has no *res judicata* effect, and the verdict and judgment in the prior federal action has no prejudicial effect upon The City of Macon's claim."

As with The City of Macon's previous efforts, this argument was supported by reference to several well-settled

authorities, beginning with *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965).

The Supreme Court of Georgia, in denying the City's Petition for Certiorari, offered neither explanation nor discussion. In seeking to have the Georgia courts recognize and honor the clear mandate of Federal Rule of Civil Procedure 13(g), The City of Macon filed a Motion for Rehearing, directed to the May 4, 1989, ruling by the Supreme Court of Georgia, denying the Writ of Certiorari. In that Motion for Rehearing, The City of Macon urged:

> "Petitioners' second basis for asserting this Motion for Reconsideration is premised upon the repeated failures of the trial court and the Court of Appeals to acknowledge the distinction between our systems of federal and state courts and to address one of those clear differences which sometimes arise as an incident of having the two separate systems of courts. Even if the City of Macon had been a *party* to the other litigation which proceeded to verdict in the federal court, the judgment in that Court could not prejudice its right to assert its own, direct claim in the action below. It is clear that a defendant's election, not to assert a cross-claim in a federal action, cannot operate to bar that party's separate and independent claim for the damages which it has suffered directly. *E.g., Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1503 (D.C. Cir. 1984)" (Citations omitted.)

Thus, at every stage of the proceedings, the federal questions were "timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari." Supreme Court Rule 21.1(h).

ARGUMENT OF LAW AND CITATION OF AUTHORITIES

An election by a party in a federal action not to pursue a permissive Cross-claim has no res judicata effect, and the verdict and judgment in the prior federal action has no prejudicial effect upon the City of Macon's claim.

When a state law is in conflict with an applicable federal statute, the Supremacy Clause of the United States Constitution requires that the state law must yield. Constitution of the United States, Article VI.

The federal action was based upon diversity of citizenship, and state law therefore determines, to a great extent, the substantive rights of the parties. *E.g., Erie Railroad Company v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.C. 817 (1938). However, the *Erie* mandate that state law be consulted to determine the party's substantive rights in a diversity action does not permit a state's procedural rules or requirements to overrule or displace an applicable federal rule; this principle would seem to be too settled to admit of argument. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965).

In the instant case, the trial court, and later the Court of Appeals, appear to have concluded that the actions of the Authority in the concurrently pending federal action could operate to prejudice the City's own claims. (There are inherent falacies in this assumption: There is no demonstration or showing that the Authority had any such authority or power and the statute establishing the authority specifically prohibits it from doing anything to create liabilities against the City. Georgia Laws 1962, pp. 2323, 2325-26.). However, for purposes of this section of this Brief, the City will assume, arguendo, that the acts of

the Authority in the concurrent, federal action are somehow binding upon the City.

Even making this assumption, for the sake of argument, the Authority's election, in the then concurrently pending federal action, not to pursue a cross-claim for the damage to the hangar itself cannot be urged now as a bar to a direct claim for the actual damages which resulted from the destruction of the hangar itself. While the substantive law of Georgia might have defined the cause of action to be litigated in the federal action, all matters of procedure with regard to that action were governed by the Federal Rules of Civil Procedure. *Thomson-CSF Components Corp. v. Hathaway Instruments, Inc.* 85 F.R.D. 344, 346 (D.C.N.J. 1980); *see* 28 U.S.C. § 2072.

Under the applicable federal law which governs the procedural aspects, cross-claims are clearly permissive in nature, not compulsory; therefore, a party has the option, without prejudice, to litigate a matter (which might be asserted by way of cross-claim) separately and later as an independent cause of action. *Dunn v. Sears, Roebuck & Co.*, 645 F.2d 511, 512-13 (5th Cir. 1981) (f.n. 1). (Moreover, and with regard to the date upon which the City of Macon filed its action, the Georgia courts also appeared then to recognize that cross-claims were purely permissive and could be deferred and asserted in a separate action. *See*, O.C.G.A. § 9-11-13(g); *Reeves Transportation Co. v. Gamble, et al.*, 126 Ga. App. 165, 167, 190 S.E.2d 95 (1972).)

It should be noted further that the only claims which the Authority chose to assert in the concurrently pending federal action were its derivative claims for indemnification. The Georgia courts have long noted that claims for

contribution and/or indemnity are separate and distinct causes of action, with their own peculiar qualities, such as different accrual dates for purposes of the statute of limitations. *See, e.g. Independent Manufacturing Company, Inc. v. Automotive Products, Inc.*, 141 Ga. App. 518, 520, 233 S.E.2d 874 (1977).

Therefore, even if the City and the Authority were determined to have some principal and agent relationship or privity, a derivative cause of action for contribution or indemnity would be separate and distinct from either party's direct claim for damages which it suffered itself. Thus, it is dispositive to note that a party in a federal action may assert a cross-claim for indemnification, without any requirement that it also assert other, direct claims which it might have. *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1503 (D.C. Cir. 1984).

Indeed, by virtue of the other action having pended in federal court, the City would have maintained its right to assert its claims for its own damages in a separate cause of action even if the City had been a named party to the federal action. Under federal procedure, the permissive nature of a cross-claim seems to be so well-settled that the issue has been raised or contested in only a very few cases, which are cited in this argument. "Thus, if such a claim is neither asserted nor litigated, the parties cannot be barred from asserting it in a later action by principles of *res judicata*, waiver, or estoppel." *Peterson v. Watt*, 666 F.2d 361, 363 (9th Cir. 1982), *citing Augustin v. Mughal*, 521 F.2d 1215, 1216 (8th Cir. 1975).

CONCLUSION

Rule 17.1 of this Court defines clearly three situations in which a Petition for Writ of Certiorari will be favorably entertained. The City of Macon submits that the instant case, while having its origin in a housekeeping or procedural context of humble stature, presents a compelling case for the grant of certiorari under either of the three standards. First, the Opinion of the Court of Appeals of Georgia and the studied silence of the Supreme Court of Georgia, in derogation of the clear mandate of Federal Rule of Civil Procedure 13(g), constitute such a departure from the usual course of judicial proceedings, by the trial court, as well as a sanction thereof by the Georgia appellate courts, as to "call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). Moreover, it is clear that the Georgia courts' conscious decision not to look to federal law for a definition or determination of the scope of the concurrently pending federal action, and the legal effect of permissive cross-claims, and the scope of any judgment ultimately rendered therein, is in direct violation of the cited decisions of the federal Courts of Appeal as well as this Court; the Georgia courts have in essence decided *sub silentio* federal questions in a way which clearly conflicts with the most basic law applicable to federal procedure. *See e.g., Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965). As such, the Writ of Certiorari should be granted. Supreme Court Rule 17.1(b) and (c).

If *Hanna v. Plumer* and its progeny are to mean anything, they should stand for the doctrine that, with regard to procedural matters, counsel and parties should be able to look to the Federal Rules of Civil Procedure (and the

federal cases interpreting them) and know that they can make decisions or take action comfortably with regard to well-settled points. A litigant in a federal court (or one who is aware of concurrently pending litigation in a federal court) should not have to proceed subject to the risk that, after the conclusion of the federal litigation, a state court can in effect nullify the federal rules by the manner in which it defines some corollary, state doctrine. In this case, no definition of *res judicata* or estoppel should be permitted or countenanced if it has the effect of vitiating the clear import of an applicable federal procedural rule.

While the issues raised by the City of Macon may seem to border on the minutia of pleading, there are two significant points. First, the City of Macon's rather substantial claim for the destruction of its hangar has been eliminated, and the City has never been permitted to present its claim on the merits, by virtue of a technical ruling which is clearly at variance with uncontradicted and unanimous federal authority, which holds without ambiguity or qualification that the City's own claims should in no way be affected by the Authority's elections as to the assertion of the Authority's cross-claims in the federal action. Second, to countenance the result which has been reached below would mean that any federal litigant in deciding whether or not to assert a cross-claim (or, for that matter, make any other tactical decision regarding pleading) could not resort to or rely upon the Federal Rules of Civil Procedure but must instead also look to the separate law of each state or jurisdiction where a judgment might be enforced or where even the most remotely related other proceedings might pend.

Such a lack of predictability is inconsistent with the goal of having any rules of procedure, and such a lack of uniformity is inconsistent with the basic purpose of having Federal Rules of Civil Procedure which apply to all actions which pend in the federal courts. Petitioner The City of Macon, Georgia, although cognizant of this Court's case load, submits that certiorari should be granted so that this Court can exercise its power of supervision to enforce the validity of the Federal Rules of Civil Procedure and to confirm their primacy with regard to the conduct of litigation in the federal courts.

This 23 day of June, 1989.

LONG, WEINBERG, ANSLEY & WHEELER

By: WILLIAM MEADE BURNS, JR.
Attorney At Law, P.C.
Ga. Bar No. 097000

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APPENDIX

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2. Order of the Court of Appeals of Georgia, dated March 27, 1989, denying The City of Macon's Motion for Rehearing A-6

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6. Complaint filed on behalf of the City of Macon in the Superior Court of Fulton County on April 11, 1984 ..... A-12

APPENDIX A

NOTICE: *MOTIONS FOR REHEARING MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985)

Birdsong, C.J.
Banke, P.J., & Beasley, J.

In the Court of Appeals of Georgia March 8, 1989

77779. THE CITY OF MACON, GEORGIA v. PASCO BUILDING SYSTEMS et al. Bea-222

BEASLEY, Judge.

The City of Macon sued Pasco and Delta Associates in tort (negligence) for damages resulting from the collapse in a windstorm of an airport hangar and attached office building. The structures were designed, manufactured and fabricated by Pasco under specifications provided by Delta. A negligence action was already pending in federal district court by Zantop International Airlines, a sublessee, and its insurer for damage to two airplanes in the hangar at the time of the collapse. Named as defendants were Pasco, Delta, the Macon-Bibb County Industrial Authority, and others. The Authority denied all allegations of negligence and, pursuant to an extension of time for further pleadings, in that federal suit, cross-claimed against Pasco for indemnity.

Before trial of the instant case, a jury verdict and judgment in favor of all defendants was entered on the federal suit. Based on it, the state court granted summary judgment to Pasco and Delta. It concluded that Macon

and the Authority were privies and that the issue of Pasco's and Delta's alleged negligent construction of the hangar was fully adjudicated in the federal court, barring Macon from relitigating that issue.

Macon's appeal asserts that since the Authority served only as a "financing conduit" for it, the two entities did not have such privity as to bar Macon's claims in this action. Under the facts presented the trial court correctly determined that Macon and the Authority were privies so as to invoke the res judicata proscription of OCGA § 9-12-40.

The record established that the Authority was created by legislative act (Ga. L. 1962, pp. 2323 et seq.) as a "public body corporate and politic [and] instrumentality" of the city of Macon and Bibb County. It was the conduit for the city for the purpose of developing the facility. Pursuant to a lease agreement of November 1, 1979, Macon, as owner of the property on which the hangar was built, leased the property to the Authority for 15 years. The parties agreed that all buildings and improvements were to remain the sole property of the Authority and would not constitute part of the leased land.

The Authority had contracted with Pasco and Delta for the construction of the hangar and office/shopping complex on September 6, 1979. Under the lease Macon was pledged the rentals received from leasing these buildings for the payment of principal and interest on bonds it issued to pay for construction. The lease of the hangar was between the Authority and the tenant airline, with no property rights assigned to Macon. After the

collapse of the buildings, the Authority contracted for their demolition.

Both Macon and the Authority are named insureds under Macon's policy for hazard insurance. A loan receipt executed by Macon and the Authority with the insurer on July 14, 1983, pledges the loan amount to be repaid from any recovery which Macon and/or the Authority might obtain from third parties. Macon and the Authority jointly submitted a sworn proof of loss claim to the insurer and joint payments for loss of the buildings and debris removal were issued.

"OCGA § 9-12-40 provides that 'A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.' OCGA § 9-12-42 provides that 'For a former judgment to be a bar to a subsequent action, the merits of the case must have been adjudicated.' These code sections together set out the basic principles of res judicata in Georgia. For res judicata to act as a bar of a subsequent action, the original and subsequent action must bear certain identical characteristics. The two actions must be between identical parties or their privies, and the cause of action in each suit must be identical. Collateral estoppel, like res judicata, requires identity of the parties or privity. However, unlike res judicata, collateral estoppel does not require identity of the claim but only precludes readjudication of an issue already adjudicated between the parties or their privies in a prior action. [Cit.]" *Norris v. Atlanta & West Point R. Co.*, 254 Ga. 684-685 (333 SE2d

835) (1985). "Further, the doctrine of res judicata will bar an action 'even if some new factual allegations have been made. . . .' [Cits.]" *Williams v. Summit Psychiatric Centers,* 185 Ga. App. 264, 267-268 (6) (363 SE2d 794) (1987).

The Authority was an instrumentality of Macon, or an "agent" created by legislative enactment. See *Knowles v. Housing Authority of Columbus,* 212 Ga. 729 (95 SE2d 659) (1956); *Richmond County Housing Authority v. McLain,* 112 Ga. App. 209 (144 SE2d 565) (1965). The Authority was the actual owner of the buildings and lessee of the property on which they stood. To the extent that Macon had any property interest in these buildings, for the destruction of which it sought recovery, such interest was derived from the interest of the Authority. Thus that which is res judicata as to the Authority is res judicata as to Macon. *Williams,* supra.

Although the Authority filed a cross-claim for indemnity in the federal action, it did not add any claims it had against Pasco and Delta even though it was granted an extension of time to do so. Any grounds for recovery which Macon had were assertible in federal court. "The factual allegations supporting this claim are identical to those alleged [in the federal action] and had the claims been properly presented, the federal court could have adjudicated the [claims raised here] by exercising pendent jurisdiction." *Hill v. Wooten,* 247 Ga. 737, 738 (279 SE2d 227) (1981). Accord *Monroe v. Lubonivic,* 174 Ga. App. 191 (1) (329 SE2d 583) (1985).

Although Pasco and Delta were the Authority's co-defendants in the federal case, the same issues of negligence were involved and the Authority as agent for the

city could have raised any claims for damages to Macon's ownership interests. See *Charlton Development Authority v. Charlton County*, 253 Ga. 208 (317 SE2d 204) (1984). "Thus, even if it can be said that the [present] case asserts a different claim than the claims asserted . . . in the federal court, [Macon] would also be barred by the final judgment in the federal case as the issues in the various claims are identical." *Chilivis v. Dasher*, 236 Ga. 669, 671 (225 SE2d 32) (1976). See also *Barnes v. City of Atlanta*, 186 Ga. App. 187 (1) (366 SE2d 822) (1988); *Smith v. Carlton Farms*, 181 Ga. App. 743 (1) (353 SE2d 624) (1987).

The motions for summary judgment were properly granted.

Judgment affirmed. Banke, P. J., and Birdsong, J., concur.

APPENDIX B

Court of Appeals

of the State of Georgia

ATLANTA March 27, 1989

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

77779. THE CITY OF MACON, GEORGIA v. PASCO BUILDING SYSTEMS A DIVISION OF AMCORD, INC. ET AL

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta March 27, 1989

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
CLERK.

APPENDIX C

Clerk's Office, Supreme Court of Georgia

Atlanta May 04, 1989

Case No. 46948, The City of Macon V. Pasco Building Systems A Division Of Amcord, Inc., et al.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

C/A #7779

Very truly yours,

JOLINE B. WILLIAMS, Clerk

APPENDIX D

Clerk's Office, Supreme Court of Georgia

Atlanta May 25, 1989

The motion for a rehearing was denied today:

Case No. 46948, City of Macon V. Pasco Building Systems, et al.

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE CITY OF MACON, GEORGIA,	:	
Plaintiff	:	
vs.	:	C.A. No. D-08793
PASCO BUILDING SYSTEMS, a Divison of AMCORD, INC., et al.,	:	
Defendants	:	

ORDER ON MOTIONS

This case came on regularly for a hearing on a motion for summary judgment filed by Defendant Pasco Building Systems, a Division of Amcord, Inc., and on an amended motion for summary judgment filed by Defendant Delta Associates, Inc.

DEFENDANT PASCO'S
MOTION FOR SUMMARY JUDGMENT

Prior to the present suit being filed, Defendants Pasco Building Systems ("Pasco") and Delta Associates, Inc. ("Delta") and another entity, Macon-Bibb County Industrial Authority ("MBIA"), were sued by Zantop International Airlines, Inc. and Puritan Insurance Company in the United States District Court for the Middle District of Georgia, Columbus Division (C.A. No. 83-158-COL). Zantop and Puritan alleged defendants negligently manufactured, designed, planned and constructed a hangar located at Lewis B. Wilson Airport in Macon,

Georgia and, that as a result of such negligence, the hangar collapsed damaging several of Zantop's airplanes. The federal litigation was concluded on March 26, 1987, with a jury verdict for all of the defendants. A judgment *nunc pro tunc* was entered in that case on April 9, 1987.

On April 11, 1984, City of Macon filed the present suit alleging Defendants Delta and Pasco were negligent in designing, testing and inspecting a hangar at Lewis B. Wilson Airport, the same hangar which was the subject matter of the Zantop federal litigation

It appearing that City of Macon is a privy of the MBIA and that the issue of Defendants Pasco's and Delta's alleged negligent construction of the hangar was fully adjudicated in the prior federal suit, City of Macon is barred from relitigating the aforesaid negligence issue pursuant to the doctrine of collateral estoppel (estoppel by judgment). See OCGA § 9-12-40 and *Smith v. Wood et al.*, 115 Ga. App. 265 (154 S.E. 2d 646) (1967). Cf. *Livesay Industries, Inc. et al. v. Livesay Window Co., Inc.*, 202 F.2d 378, 382 (5th Cir. 1953) and *Usher v. Johnson et al.*, 157 Ga. App. 420, 422 (278 S.E. 2d 70) (1981). Accordingly, Defendant Pasco's motion for summary judgment is granted.

DEFENDANT DELTA'S AMENDED MOTION FOR SUMMARY JUDGMENT

Defendant Delta having incorporated Defendant Pasco's motion for summary judgment in its amended motion for summary judgment, and this court having decided that Defendant Pasco's motion should be granted, this court also finds that Defendant Delta's amended motion is meritorious. Accordingly, Defendant

Delta's amended motion for summary judgment is granted. (In view of this ruling perhaps it is unnecessary to rule upon Defendant Delta's motion for partial summary judgment. However, in the name of judicial economy this court has considered that motion and has concluded that the limitation of liability clause in Defendant Delta's contract with MBIA is valid and that the motion for partial summary judgment is meritorious.)

This 25 day of January, 1988.

/s/ William H. Alexander
William H. Alexander
Judge

Copies to:
Dan B. Wingate, Esq.
George W. Hart, Esq.
John W. Greenfield, Esq.

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE CITY OF MACON, GEORGIA Plaintiff, v. PASCO BUILDING SYSTEMS, a Division of AMCORD, INC. and DELTA ASSOCIATES, INC. Defendants.	)	CIVIL ACTION FILE NO. D-8793 (Filed April 11, 1984)

COMPLAINT

NOW COMES THE CITY OF MACON, GEORGIA, Plaintiff, and states its Complaint, as follows:

1.

Defendant Pasco Building Systems, a Division of Amcord, Inc., is a Delaware corporation, with its registered agent for service of process at C. T. Corporation, 2 Peachtree Street, Atlanta, Fulton County, Georgia. Said Defendant is subject to the jurisdiction of this Court and venue is proper in Fulton County.

2.

Defendant Delta Associates, Inc. is a Georgia corporation with its principal place of business in Muscogee County, Georgia, and may be served with process by second original upon its registered agent, H. Wilson

Hawthorn, at 1000 Airport Throughway, Columbus, Georgia. Said Defendant is subject to the jurisdiction of this Court as a joint tortfeasor and venue is proper in Fulton County.

3.

In 1979, the Macon-Bibb County Industrial Authority, which was created and formed by an act of the General Assembly of the State of Georgia, with its location in Macon, Bibb County Georgia, caused to be constructed on behalf of Plaintiff and on land owned by Plaintiff, a pre-engineered metal aircraft hangar with office and shop complex at the Lewis B. Wilson Airport in Macon, Bibb County, Georiga.

4.

Defendant Pasco Building Systems, a division of Amcord, Inc., manufactured and fabricated the materials with which the hangar structure was constructed and, further, participated in the design of the hangar structure and its internal structures and components.

5.

Defendant Delta Associates, Inc. was retained as an engineering and planning consultant during the design and construction of the hangar. In this capacity, said Defendant participated in the design of the hangar structure and conducted inspections and supervision of the actual construction of the hangar.

6.

The hangar was completed in 1980, and, at that time, the structure was leased to a tenant and, subsequently, subleased to another tenant. The Plaintiff earned income as a result of the lease and sublease arrangements.

7.

On March 21, 1982, the hangar structure collapsed, as a result of the negligence, jointly and severally, of the Defendants in the following particulars, among others:

(a) The hangar was defectively and inadequately designed, tested and inspected by the Defendants.

(b) The hangar lacked adequate cross-bracing to withstand normal weather conditions and was inadequate for the purposes for which it was designed due to the negligence of the Defendants.

(c) The hangar was fabricated by Defendant Pasco in such a manner that the materials forming the structure of the hangar were improperly or inadequately welded and created a structure which was inadequate for the purposes for which it was designed.

(d) Defendants failed to exercise reasonable care to supervise or inspect the construction of the hangar.

8.

As a direct and proximate consequence of the Defendants' joint and several negligent acts and omissions, the Plaintiff has sustained damages for the loss of the hangar structure, reconstruction costs, and loss of income from the lease and sub-lease of the hangar.

WHEREFORE, Plaintiff, The City of Macon, Georgia, prays:

(a) That it have judgment against Defendants Pasco Building Systems, a division of Amcord, Inc. and Delta Associates, Inc., jointly and severally, in an appropriate and fair amount to be determined and awarded by the jury;

(b) That all costs of this action be cast upon Defendants; and

(c) That Plaintiff have such other and further relief which the Court determines is fair and proper.

LONG, WEINBERG, ANSLEY & WHEELER

BY: /s/ Sidney F. Wheeler
SIDNEY F. WHEELER

BY: /s/ Joseph W. Watkins
JOSEPH W. WATKINS

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Supreme Court, U.S.
FILED
JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-2110

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF MACON, GEORGIA,

Petitioner,

vs.

PASCO BUILDING SYSTEMS, A Division of AMCORD, INC., and DELTA ASSOCIATES, INC.,

Respondents.

On Petition for Writ of Certiorari to Supreme Court of Georgia

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ELAINE W. WHITEHURST
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OR CALL COLLECT (402) 342-2831

1709.

QUESTIONS PRESENTED

The respondent shows this honorable Court that the petitioner's statement of the questions presented fails to meet the requirements of the Rules of the Supreme Court 21.1(a) and 21.5, in that the statements are repetitious, argumentative, and neither concise nor short. As set out in the argument below, respondent shows this honorable Court that there is no federal question involved in the present case.

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JURISDICTIONAL STATEMENT

The respondent shows this honorable Court that jurisdiction is lacking, in that no substantial federal question is present in this case. Although the Georgia Court of Appeals decision is a final one, it is based squarely upon state law grounds and does not meet the standard of a reviewable decision set out in 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The respondent shows this honorable Court that only Georgia law is the basis of the Georgia Court of Appeals opinion. See, Appendix to Petition for Certiorari, A2, A3.

O.C.G.A. §9-12-40:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or, which under the rules of law, might have been put in issue in the case wherein the judgment was rendered until the judgment is reversed or set aside.

No federal constitution or statutory provisions are at issue.

CONCISE STATEMENT OF THE CASE AND STATEMENT OF FACTS

The petitioner's Statement of the Facts and Statement of the Case is encumbered by irrelevant and disputed facts, while omitting mention of important undeniable

matters upon which the Georgia Court of Appeals actually based its opinion. For example, the substantial "history" dredged from the testimony of Tom Moody is neither relevant to the issues, nor necessary for an understanding of the grant of the respondent's motion for summary judgment. (See Petitioner's Brief at pages 5 - 7.)

Here is the statement of material facts, with citations to the record, upon which the Georgia Court of Appeals' decision was actually based:

1.

The City of Macon (hereinafter sometimes referred to as "the City") is a city chartered by Act of the Georgia Legislature. 1977 Ga. Laws 3776. The Macon-Bibb County Industrial Authority (hereinafter sometimes referred to as "the Authority") is a public body corporate and politic and an instrumentality of the City of Macon, created by Act of the General Assembly in 1962.

2.

The City owned the real property on which the hangar at issue was built and leased this property to the Authority under a resolution adopted January 9, 1979. The "Lease Agreement and Contract" was entered on November 1, 1979. (*See*, Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., Interrogatory No. 10, R-212 and R-224.)

3.

The Lease Agreement and Contract between the City and the Authority expressly states that, during the term of the lease (November 1, 1979 to November 1, 1994), any buildings or other improvements built by the Authority

shall remain the sole property of the Authority and shall not constitute part of the leased land. (Lease Agreement and Contract, Article III, §3.1; R-232.)

4.

In the Lease Agreement and Contract between the City and the Authority, the Authority pledged the rentals received from its leases to the payment of the principal and interest on bonds it issued to build the hangar in question. (Lease Agreement and Contract, Article II, §2.2(e), Article III, §3.5, R-232 and 235, respectively.)

5.

The Authority, as "owner", contracted with Warren Associates, Inc. for the construction of the "pre-engineered metal aircraft hangar and office/shop complex" on September 6, 1979. The City was not a party to that contract. ("Contract" between Warren Associates, Inc. and Macon-Bibb County Industrial Authority, R-161).

6.

No property rights in the hangar belonging to the Authority were assigned, transferred or conveyed to the City. (Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., No. 10, R-212.)

7.

The Authority, as owner, executed an "Owner-Engineer Agreement", entitled "Standard Form of Agreement Between Owner and Engineer for Professional Services Between Macon-Bibb County Industrial Authority and Delta Associates, Inc. for Construction of Hawaiian Air Cargo Maintenance Hangar Complex, Lewis B. Wilson

Airport, Delta No. Ga. 7908-C". (Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., No. 9, R-211.)

8.

The Authority, as owner, executed a Certificate of Substantial Completion with Warren Associates, Inc. on June 28, 1980 for the project "Hawaiian Air Cargo Hangar, Lewis B. Wilson Airport, Macon, Georgia". (Certificate of Substantial Completion, R-164.)

9.

The Authority, on behalf of the City, caused the construction of the pre-engineered metal aircraft hangar with office and shop complex on land owned by the City at the Lewis B. Wilson Airport in Macon. (Complaint, paragraph 3, R-3-4.)

10.

Pasco Building Systems designed, manufactured and fabricated the materials with which the hangar structure was constructed. (Complaint, paragraph 4, R-4.)

11.

After the hangar collapse in a windstorm on or about March 21, 1982, the Authority, as owner, executed a Demolition Services Contract with Warren Associates, Inc. on April 29, 1982. (*See*, Demolition Services Contract, R-242.)

12.

A Lease Agreement entered into by and between the City, the Authority and Hawaiian Airlines was executed

on or about September 5, 1979. Thereafter, the facility was subleased from Hawaiian Airlines to Zantop International Airlines, Inc., on or about September 2, 1980. Later amendments to these Lease Agreements were entered on October 4, 1982 and September 12, 1983. (*See*, Plaintiff's Answers to the First Interrogatories of Defendant Delta Associates, Inc., No. 10, R-212.)

13.

A loan receipt was executed by the Authority and the City dated July 14, 1983 with respect to this hangar. The loan receipt pledges the loan amount to be repaid from any recovery which the "City of Macon and or the Macon-Bibb County Industrial Authority" might obtain from third parties. (R-175.)

14.

Both the City and the Authority are named as insureds under the City's policy for hazard insurance to the hangar in question. (*See*, Plaintiff's Responses to Defendant Delta Associates, Inc.'s First Interrogatories, No. 11, R-214.)

15.

The Insurance Company of North America made payments totalling $730,068.28 to or on behalf of the City and the Authority for the loss of the hangar and debris removal. (Responses of Plaintiff to First Interrogatories of Pasco Building Systems, No. 10, R-190.) Both the City and the Authority executed a "Sworn Statement in Proof of Loss" on July 14, 1985. (R-173.)

16.

In its Complaint in the case at bar, the City of Macon sued Pasco Building Systems and Delta Associates, Inc., alleging that "as a direct and proximate consequence of the defendants' joint and several negligent acts and omissions, the plaintiff has sustained damages for the loss of income from the lease and sub-lease of the hangar." (Complaint, paragraph 8, R-5.)

17.

Specifically, the damages sought by the City of Macon against this defendant include $848,230.00 for loss of the hangar structure; $730,068.28 for reconstruction costs; and $140,038.53 for loss of income from the lease and sub-lease of the subject hangar. (*See*, Responses of Plaintiff to First Interrogatories of Pasco Building Systems, Response No. 11, R-191.)

18.

At the time the City filed the present lawsuit against these defendants, a "related case" was pending in the United States District Court for the Middle District of Georgia, Columbus Division, Case No. 83-158-COL: "Zantop International Airlines, Inc. and Puritan Insurance Company, Plaintiffs v. Delta Associates, Pasco Building Systems, **Macon-Bibb County Industrial Authority**, Warren Associates, Southeastern Building Services, Burdeshaw & Johnson, P.C., Georgia Steel and Georgia Structural, Defendants." (emphasis added) (*See*, Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., "introductory notes," R-199; and certified

copies of the federal court suit, R-127 to 160.) The City refers to this lawsuit as the "Zantop litigation".

19.

In the Zantop litigation, Zantop International Airlines sued the defendants for negligence alleged to have caused damage to certain aircraft housed in the hangar. (*See*, certified copy of the Amended Complaint, paragraphs 23, 25, and 26, R-155 to 156.) The Authority acknowledged service in the Zantop litigation and entered into a stipulation which provided it an extension of time "to file any and all pleadings, defenses, *cross-claims*, motions and any other defenses." (*See*, certified copies of Acknowledgment of Service and Stipulation as to Extension of Time and Order thereon, filed November 16, 1983, R-147 and 148.)

20.

The Authority cross-claimed against Pasco Building Systems in the Zantop litigation for indemnity. (*See*, "Separate Defenses and Cross-Claim of Defendant Macon-Bibb County Industrial Authority to Amended Complaint of Plaintiffs," originally filed December 28, 1983 and refiled May 23, 1984, with certified copy of the records from Zantop litigation, R-139 and 131, respectively.)

21.

In response to Zantop's allegations of negligence in the "Zantop litigation" (including allegations of negligence by Pasco), the Authority answered as follows:

> This defendant **denies** paragraph 25 in its entirety including subparagraphs (a) through (g) thereunder. This defendant specifically says that it has not been

> negligent in any manner whatsoever. (emphasis added)

(Separate Defenses and Cross-Claim of Defendant, Macon-Bibb County Industrial Authority to Amended Complaint of Plaintiffs, paragraph 25, filed December 28, 1983, and again May 23, 1984, R-139 and 131.)

22.

The Zantop litigation resulted in a defendant's verdict, after a two-week jury trial, finding no negligence on the part of any of the defendants. (*See*, certified copies of "Judgment in a Civil Case" and "Verdict" in the Zantop litigation, R-129 and 130.)

ARGUMENT AND CITATION OF AUTHORITY

Succinctly stated, the Georgia Court of Appeals was correct in affirming the trial court's grant of summary judgment to the respondents because the City was, and is, in privity with the Authority and its claims are therefore barred by Georgia's doctrine of estoppel by judgment. O.C.G.A. §9-12-40. As this relates to the propriety of a writ of certiorari by this Court, there simply is no substantial federal question at issue in the case. 28 U.S.C. §1257. On its face, the Georgia Court of Appeals' decision is based squarely upon O.C.G.A. §9-12-40. (See, Appendix to the Petition for Certiorari, the opinion of the Georgia Court of Appeals, pages A-2, paragraph 2; and A-3, paragraph 2.) The petition fails to show a case within 28 U.S.C. §1257.

Leaning very heavily on *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), the petitioner seeks to present a conflict between a state and federal procedural rule. The petitioner seizes upon the fact that a cross-claim by the Authority was "permissive" under the Federal Rules of Civil Procedure and that, therefore, it should not be barred because of its absence in the prior federal court suit, based upon O.C.G.A. §9-12-40. But, as petitioner itself recognizes, it was not *necessarily* what failed to appear in the prior federal court suit (the permissive cross-claim) that bars the City now; it is what did appear there: a denial of negligence on the part of any defendant by the same party who subsequently wants the opportunity to prove negligence on the part of the defendants.

There is a certain irony in the petitioner's bold and hardy assertion of the federal procedural rules over any Georgia rule which might be contrary. It is, after all, the dignity and finality of the federal court's judgment that the respondent asserted and the trial court recognized. The Federal Rules of Civil Procedure 13 and O.C.G.A. §9-11-13 are substantially identical. The result would have been the same if the Zantop litigation had been in state court. There simply is no *Hanna v. Plumer* conflict between a state and federal rule.

In *Pope v. City of Alexander*, 240 Ga. 177, 240 S.E.2d 241 (1977), the Georgia Supreme Court held that the state courts of Georgia would use the same rules as the federal court in determining whether an issue could have been raised in that court's litigation. Under the Federal Rules of Civil Procedure, the Authority could have cross-

claimed against Pasco for damages to its ownership interest and, as an agent for the City, for any damage to the City's interests caused by Pasco's alleged negligence. The Authority did, in fact, cross-claim for indemnity but did not add its own property damage claims, even though it was given an extension of time to add any claims it had against Pasco. (*See*, R-139 and R-131.)

Under federal rules, if cross-claims arise out of the main transaction or occurrence, they are ancillary to it and federal jurisdiction will not fail when they are asserted. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). *Pope, supra*, held that the key to whether the claim was barred by *res judicata* in Georgia is whether the federal court would have exercised its pendant jurisdiction. *Id.* at 179. Even without the inconsistency in pleading shown above, since the Authority *could* have, but did not, raise the present claims, they are now barred by the prior judgment. O.C.G.A. §9-12-40.

There is no such thing, under the Georgia Civil Practice Act or the Federal Rules of Civil Procedure called a "compulsory cross-claim." Yet, O.C.G.A. §9-12-40 bars claims that *could* have been raised, the procedural rules notwithstanding. One must review substantive law to determine estoppel, not merely rely on an omission in the procedural rules. This construction of Georgia's estoppel by judgment rule is neither aberrant nor novel. *Citizens Exchange Bank of Pearson v. Kirkland*, 256 Ga. 71, 344 S.E.2d 409 (1986); ("Mrs. Kirkland, the plaintiff here, could have raised the issue of her codefendant's negligence by way

of cross-claim in the previous action."); *Monroe v. Lubonnic*, 174 Ga. App. 191, 329 S.E.2d 583 (1985); and *Roberts v. Hill*, 81 Ga. App. 185, 186, 58 S.E.2d 465 (1950).

The City stumbles over the word "permissive" in the newer Federal Rules of Civil Procedure and concludes that the procedural rule worked a substantive change on what has always been Georgia's estoppel rule. In fact, the procedural rules are nothing more than "housekeeping" rules and could never rise to the level of altering vintage substantive Georgia law in a diversity case. "[The FRCP] shall not abridge, enlarge, or modify the substantive right[s]." 28 U.S.C. §2072. The federal procedural rule may call the Authority's claims "permissive", but the substantive law deems them necessary to further its policy as articulated in O.C.G.A. §9-12-40, *Kirkland and Morris, supra.*

CONCLUSION

Because the decision of which the petitioner seeks review by writ of certiorari is based upon the state law grounds of O.C.G.A. §9-12-40 and raises no substantial federal question, the petition for writ of certiorari should be denied.

Dated July 27, 1989.

Respectfully Submitted,

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No. 88-2110

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF MACON, GEORGIA,

Petitioner,

v.

PASCO BUILDING SYSTEMS, a Division of AMCORD, INC., and DELTA ASSOCIATES, INC.,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

May Georgia courts decide as a matter of Georgia law that the issue of alleged negligence was fully adjudicated in a prior action in federal court, and thus the Petitioner, City of Macon, is barred, pursuant to the doctrines of collateral estoppel and *res judicata*, from relitigating the same issue?

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No. 88-2110

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STATEMENT OF THE CASE

In order to avoid apparent inaccuracies and omissions, certain additions to Petitioner's Statement of Facts are necessary to an understanding of the case.[1]

[1] Respondent Delta Associates, Inc., adopts Petitioner's Appendix as the Joint Appendix. References are to that appendix, e.g. (J.A.5).

The City of Macon, Georgia ("City") owned land at the Airport. The City deeded certain land to the Macon-Bibb County Industrial Authority ("MBIA" or "Authority"). The Authority then owned the land; it sold revenue bonds; it contracted for the design and construction of the hangar; it leased the hangar; it collected rent; it made the payments on the bonds. In the future, when the bonds were to be retired, the land and hangar would revert to the city's ownership. (J.A.2)

Thus, Petitioner's assertion that "the mere recital regarding title should be of no moment to a resolution of the claims . . . " is not accurate. As determined by the Georgia courts, applying Georgia law, the Authority and the City had coincident interests in the hangar for purposes of determining privity, collateral estoppel, and *res judicata*. (J.A.2)

Delta Associates, Inc. (hereinafter "Delta") is a small civil engineering firm which contracted directly with the Authority, owner, to provide certain civil engineering services in connection with the layout, location, and overall parameters of the metal hangar (a "Butler" type building). (J.A.1)

Pasco Building Systems ("Pasco") designed and manufactured the metal hangar pursuant to the parameters specified by Delta. (J.A.1)

The storm which destroyed the hangar was officially classified by the National Weather Service's Storm Data Report for March 1982 as a severe Downburst wind storm. Downbursts are extremely strong winds of high velocity which emanate out of high cumulus clouds of a thunderstorm, and are capable of causing severe damage,

with winds which can exceed 125 miles per hour in a very small localized area. For example, a downburst may hit a single airplane approaching an airport and not affect any other airplane or other part of the airport.

One of the expert witnesses identified by the Petitioner, Dr. Theodore Fujita, of the faculty of the University of Chicago, serves as a consultant to the National Weather Service. Dr. Fujita testified that he edits the National Weather Service Monthly Storm Data Report; that he classified this storm as a Downburst; and that, based on certain facts he reviewed both in connection with the classification of the storm and after his classification of the storm, the winds which hit the hangar, in his opinion, exceeded 110 miles per hour.

All parties agree that the hangar, if properly specified, designed, and constructed, should withstand winds up to 100 miles per hour, but if winds exceeded 100 miles per hour, the hangar would be expected to collapse.

Following the Downburst wind storm, the insurance company which insured both the Authority and the City paid for the cleanup and reconstruction of the hangar and obtained a "loan receipt" that pledged the loan amount to be repaid from any recovery which the City and/or the Authority might obtain from the Defendants. (J.A.3)

The Authority's tenant in the hangar sued the Authority, Pasco, Delta, and others, for damage to its airplanes, in the United States District Court for the Middle District of Georgia. The Authority filed a crossclaim against Pasco and Delta for indemnity for any liability it had to the plaintiff, its tenant for damages allegedly

caused by the negligent specification, design, and construction of the hangar. (J.A.1)

The single dispositive fact issue in both cases is whether or not the winds exceeded 100 miles an hour. The prior case was tried to a jury in U. S. District Court. The jury determined that the winds indeed exceeded 100 miles an hour, and that the defendants, Pasco and Delta, were not negligent in the specification, design and construction of the hangar, and delivered a general verdict in favor of all defendants (the three parties to this case). (J.A.1)

Petitioner states that the verdict "mooted" any issue of potential liability of Pasco and Delta to the City. To the contrary, the verdict decided any issue of potential liability by determining that Defendants Pasco and Delta were not negligent.

Following the verdict in District Court, the Defendants in the Superior Court of Fulton County, Georgia moved for summary judgment. The trial court granted the motion, and ordered:

> It appearing that City of Macon is a privy of the MBIA [Authority] and that the issue of Defendants Pasco's and Delta's alleged negligent construction of the hangar was fully adjudicated in the prior federal suit, City of Macon is barred from relitigating the aforesaid negligence issue pursuant to the doctrine of collateral estoppel (estoppel by judgment). (J.A.10)

The Georgia Court of Appeals affirmed. (J.A.1-5)

ARGUMENT

Georgia courts may decide, as a matter of Georgia law, that the City is barred from relitigating the issue of the Defendants' alleged negligence in the specification, design, and construction of the hangar.

The existence of privity between the City and the Authority is uniquely an issue of state law, and does not involve a federal question. Georgia courts appropriately determined, under Georgia law and the facts of this case, that the City and the Authority had a coincidence of interests in the hangar, and that privity existed for the purpose of this lawsuit.

The principles of collateral estoppel and *res judicata* are matters of state law. The Georgia courts decided appropriately, under the facts of this case, that the City was barred from relitigating the same issues previously decided by a jury in federal court.

In the prior case, the City's/Authority's claim for indemnity was based entirely on the fact question of whether Pasco and Delta were negligent in the specification, design and construction of the hangar. The District Court jury found that they were not negligent. That is the identical fact question upon which the City's claim for damages is based in this case.

Petitioner argues that the Georgia courts have applied *res judicata* to abrogate the Federal Rules of Civil Procedure. That is not the precedent set by this case. The Georgia courts correctly decided that the identical question of fact upon which the City's claim is based was previously decided in an action in which the City

(through the Authority, its privy) asserted a crossclaim for indemnity.

This case does not turn on the failure of the City to assert a permissive counterclaim in the prior federal court case. The case turns on the estoppel effect of the prior decision by the jury in the federal case that these defendants were not negligent and hence neither liable to the plaintiff on the complaint nor to the City for indemnity on the crossclaim.

CONCLUSION

Any case in which a party petitions this Court for review is important to the litigants. This is a large claim case. However, it does not present an issue or special important reasons justifying the Court to exercise its judicial discretion to review.

This case turns on Georgia law, not federal law.

This case is not in conflict with decisions of other state courts or federal courts.

Furthermore, the Georgia Courts did not decide a federal question in conflict with applicable decisions of this Court.

Georgia courts decided as a matter of Georgia law issues of privity, collateral estoppel, and perhaps *res judicata*. The City is barred from asserting its claim against these Defendants because the issue of alleged negligence asserted in its crossclaim for indemnity decided by the jury in the prior case is identical to the City's claim for the damage to the hangar in this case.

Even if, as Petitioner asserts, the Georgia courts decided *"sub silentio"* federal questions in conflict with federal procedures (which we urge it did not), there is no basis for certiorari. By Petitioner's argument, if the purported error is *sub silentio*, it is of no import to the federal judicial system and creates no precedent to misguide other courts. Further, the decision has no effect outside of Georgia, and in essence, this petition seeks review of the Georgia Court of Appeals' decision, applying Georgia principles of privity, collateral estoppel, and perhaps *res judicata*.

This 28th day of July, 1989

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